
ADMINISTRATIVE LAW — CHEVRON FRAMEWORK — D.C. CIRCUIT UPHOLDS AGENCY RULE EXPANDING EXCEPTION TO AFFORDABLE CARE ACT. — *Ass'n for Community Affiliated Plans v. U.S. Department of the Treasury*, 966 F.3d 782 (D.C. Cir. 2020).

*Chevron*¹ remains a pillar of administrative law, but it is beginning to crumble.² While lower courts continue to uphold agencies' statutory interpretations that reasonably construe ambiguous provisions,³ the Supreme Court has called into question *Chevron*'s continued relevance.⁴ Recently, in *Ass'n for Community Affiliated Plans v. U.S. Department of the Treasury*⁵ (*ACAP*), the D.C. Circuit added to this landscape, upholding an agency rule that expanded the availability of "short-term limited duration insurance" (STLTI) plans, which are exempt from the requirements of the Affordable Care Act⁶ (ACA).⁷ While the D.C. Circuit's decision to grant *Chevron* deference was not surprising, *ACAP* may signal a growing trend of cases where the values underlying *Chevron* actually counsel against such deference.

Since the 1990s, federal law has exempted "short-term limited duration insurance" from most federal health insurance regulations.⁸ When Congress passed the ACA in 2010, it incorporated this exemption from the Health Insurance Portability and Accountability Act of 1996⁹ (HIPAA), leaving STLTI policies outside the bounds of the ACA's key reforms.¹⁰ But in enacting HIPAA, Congress did not provide an independent definition for "STLTI"; the first such definition came in 2004 from the Departments of Treasury, Labor, and Health and Human

¹ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

² See Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 796–99 (2017); Note, *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1238–42 (2017).

³ See Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 32 (2017); Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 37 (2018).

⁴ See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015) (resolving statutory ambiguity outside of the *Chevron* framework); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2446 n.114 (2019) (Gorsuch, J., concurring in the judgment) (raising constitutional concerns with *Chevron*); *Michigan v. EPA*, 135 S. Ct. 2699, 2713 (2015) (Thomas, J., concurring) (same).

⁵ 966 F.3d 782 (D.C. Cir. 2020).

⁶ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

⁷ *ACAP*, 966 F.3d at 784–85.

⁸ *Id.* at 784.

⁹ Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of the U.S. Code); see *id.* sec. 102(a), § 2791(b)(5), 110 Stat. at 1973 (codified at 42 U.S.C. § 300gg-91(b)(5)) ("The term 'individual health insurance coverage' . . . does not include short-term limited duration insurance.").

¹⁰ See ACA § 1551, 124 Stat. at 258 ("[T]he definitions contained in [HIPAA] shall apply with respect to this title.").

Services (Departments).¹¹ Years later, concerned that cheaper STLDI plans were drawing younger and healthier individuals out of the risk pool for ACA-compliant coverage — and causing premiums to rise — the Departments in 2016 revised their definition of STLDI to cover only plans lasting less than three months.¹²

Days after the 2016 rule was finalized, Donald Trump was elected President.¹³ He soon issued two executive orders on the Affordable Care Act: the first sought “the prompt repeal” of the statute;¹⁴ the second, after Congress did not act, highlighted STLDI’s exemption “from the onerous and expensive” requirements of the ACA and directed the Departments to consider proposing regulations “to expand the availability of STLDI.”¹⁵ The Departments issued a new rule, redefining STLDI to include all plans lasting less than twelve months.¹⁶

Shortly before the rule took effect, a group of insurance and medical service providers and purchasers¹⁷ filed suit against the Departments.¹⁸ Both sides moved for summary judgment, and the district court granted the Departments’ motion.¹⁹ First, the court held that the plaintiffs had competitor standing because, as private insurers selling plans on government exchanges, they competed with STLDI plan providers.²⁰ Second, the court considered the Departments’ rule on the merits under the *Chevron* framework, asking first whether the statutory language was ambiguous²¹ and, second, whether the agency’s interpretation was a

¹¹ See Final Regulations for Health Coverage Portability for Group Health Plans and Group Health Insurance Issuers Under HIPAA Titles I & IV, 69 Fed. Reg. 78,720, 78,748 (Dec. 30, 2004) (defining STLDI as coverage that expires “less than 12 months after the original effective date of the contract”).

¹² See Excepted Benefits; Lifetime and Annual Limits; and Short-Term, Limited-Duration Insurance, 81 Fed. Reg. 75,316, 75,326 (Oct. 31, 2016) (limiting STLDI to plans that expire “less than 3 months after the original effective date of the contract”). “By capping STLDI plans at three months and prohibiting renewals, the Departments hoped to minimize the use of STLDI as a ‘primary form of health coverage’” *ACAP*, 966 F.3d at 786 (quoting 81 Fed. Reg. at 75,317). The regulations also required companies selling short-term policies to warn potential purchasers that they did not satisfy the individual mandate. See 81 Fed. Reg. at 75,324.

¹³ See *Ass’n for Cmty. Affiliated Plans v. U.S. Dep’t of Treasury*, 392 F. Supp. 3d 22, 28 (D.D.C. 2019).

¹⁴ Exec. Order No. 13,765, 82 Fed. Reg. 8,351, 8,351 (Jan. 24, 2017).

¹⁵ Exec. Order No. 13,813, 82 Fed. Reg. 48,385, 48,385–86 (Oct. 17, 2017).

¹⁶ Short-Term, Limited-Duration Insurance, 83 Fed. Reg. 38,212, 38,242 (Aug. 3, 2018). Such plans can be renewed for a total of thirty-six months, *id.*, and consumers may string together these plans — from the same or different issuers — to last indefinitely, *id.* at 38,222.

¹⁷ The plaintiffs were a collection of organizations that (1) provide ACA-compliant individual health coverage, (2) provide various medical services, or (3) purchase ACA-compliant individual health coverage. See *Ass’n for Cmty. Affiliated Plans*, 392 F. Supp. 3d at 26.

¹⁸ The plaintiffs contended that the agency action was “arbitrary and capricious” and “contrary to law” under the Administrative Procedure Act. *ACAP*, 966 F.3d at 787.

¹⁹ See *Ass’n for Cmty. Affiliated Plans*, 392 F. Supp. 3d at 26.

²⁰ *Id.* at 31.

²¹ See *id.* at 38–42.

“permissible construction of the statute.”²² The court deemed both inquiries satisfied. Congress could have defined “short-term limited duration insurance” but did not²³ — leaving the phrase ambiguous.²⁴ The Departments’ definition of STLDI was permissible;²⁵ nothing in HIPAA or the ACA rendered their construction unreasonable.²⁶

The D.C. Circuit affirmed.²⁷ Writing for the panel, Judge Griffith²⁸ first addressed whether the rule was consistent with federal law; namely, HIPAA’s plain text and the ACA’s structure and purpose. Under *Chevron*, the panel first identified ambiguity in the phrases “short-term”²⁹ and “limited duration,”³⁰ then accepted the Departments’ interpretation as a permissible construction of those phrases.³¹ Further, the court denied that the rule conflicted with the “spirit” of the ACA.³² Congress itself had created the STLDI exception, “bak[ing]” it “into the statute itself.”³³ And for over a decade, the Departments had defined the term “almost exactly as they do today.”³⁴ They did not, as the plaintiffs asserted, squeeze a “regulatory elephant” into a “statutory mousehole.”³⁵ The panel also rejected the claim that the Departments’ rule would undermine the exchanges and thereby frustrate a key reform of the ACA.³⁶ Consequently, under *Chevron*, the D.C. Circuit found no conflict between the rule and the statutes that the Departments sought to apply.³⁷

²² *Id.* at 42 (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). After first considering the “Step Zero” question of whether to apply *Chevron*, the court did so, stating that the new STLDI rule did not exceed the regulatory authority delegated to the Departments by Congress. *See id.* at 33, 37–38.

²³ *Id.* at 39.

²⁴ *Id.* at 39–40.

²⁵ *Id.* at 43.

²⁶ *Id.* at 44. In a footnote, the court also denied that the change from the 2016 rule to the current STLDI rule was arbitrary and capricious; the Departments provided a “reasoned basis” for their departure from the 2016 rule and adequately addressed significant objections raised during the 2018 rulemaking. *Id.* at 45 n.16.

²⁷ *ACAP*, 966 F.3d at 794.

²⁸ Judge Griffith was joined by Judge Katsas.

²⁹ *ACAP*, 966 F.3d at 788–89.

³⁰ *Id.* at 789.

³¹ *Id.* at 788.

³² *Id.* at 790.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* (quoting Brief for the Appellants at 40 n.15, *ACAP*, 966 F.3d 782 (D.C. Cir. 2020) (No. 19-5212)) (“[A] legislative provision authorizing the Departments to define an entire category of insurance not subject to ordinary federal standards is no ‘mousehole.’ And a regulation that has only modest effects on the government Exchanges is no ‘elephant.’”).

³⁶ *Id.* at 791.

³⁷ *See id.* at 791–92. The D.C. Circuit also declined to strike down the rule as arbitrary and capricious. *Id.* at 792. The Departments had sufficiently acknowledged and considered the possible effects of the rule, both on the exchanges by raising premiums, *id.*, and on individuals facing coverage gaps, *id.* at 793. The panel also noted that the Departments had provided a “reasoned explanation” for their departure from the 2016 rule. *Id.* at 792 (quoting *Encino Motorcars, LLC v.*

Judge Griffith concluded by turning to the dissent. Characterizing the dissent's objection to the Departments' rule as a "prudential one," Judge Griffith emphasized the "narrow" role of judges, who could "ensure only that the Departments reasonably exercised the policymaking authority granted to them and not to [the judiciary]." ³⁸ Congress could "take back the reins" and a new President could "revisit the Departments' choice," but the D.C. Circuit could do neither. ³⁹

Judge Rogers dissented. ⁴⁰ She began by describing how Congress had enacted the ACA as a "comprehensive statutory scheme" with "interlocking reforms" designed to address longstanding issues of coverage, fair access, and affordability. ⁴¹ Even under *Chevron's* deferential framework, Judge Rogers argued that the ACA's structure rendered impermissible the new definition of "short-term limited duration insurance" for several reasons. ⁴² First, the rule encourages the use of plans that ultimately provide less than the minimum coverage required under the ACA. ⁴³ Second, the STLDI plans undermine the ACA's commitments to fair access — expressed primarily through its "guaranteed issue" and "community rating" requirements. ⁴⁴ Finally, the rule draws away younger, healthier individuals, fracturing the "single risk pool" at the heart of the ACA and ultimately compromising the affordability of ACA-compliant insurance. ⁴⁵ Where Congress in 2010 had understood STLDI as a "limited exemption[]" meant "to fill temporary gaps in coverage," ⁴⁶ the Departments in 2018 held them out as a full-blown alternative meant to compete with ACA-compliant plans. ⁴⁷ Judge Rogers concluded by rejecting the majority's "attempts to defend the Rule as consistent with the ACA." ⁴⁸

Navarro, 136 S. Ct. 2117, 2125 (2016)); *see id.* at 792–93 (citing Short-Term, Limited-Duration Insurance, 83 Fed. Reg. 38,212 (Aug. 3, 2018) (noting that the 2016 rule did not "boost enrollment" in ACA-compliant coverage, *id.* at 38,214, and reasoning that the new rule would reduce the uninsured population, *see id.* at 38,228)).

³⁸ *Id.* at 794.

³⁹ *Id.*

⁴⁰ *Id.* (Rogers, J., dissenting).

⁴¹ *Id.* at 795 (quoting *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015)).

⁴² *See id.* at 797.

⁴³ *Id.*; *see* KAREN POLLITZ ET AL., KAISER FAM. FOUND., UNDERSTANDING SHORT-TERM LIMITED DURATION HEALTH INSURANCE 2–3 (2018). *See generally* STAFF OF H. COMM. ON ENERGY & COM., SHORTCHANGED: HOW THE TRUMP ADMINISTRATION'S EXPANSION OF JUNK SHORT-TERM HEALTH INSURANCE PLANS IS PUTTING AMERICANS AT RISK (2020).

⁴⁴ *ACAP*, 966 F.3d at 798 (Rogers, J., dissenting).

⁴⁵ *Id.* (quoting 42 U.S.C. § 18032(c)(1)).

⁴⁶ *Id.* at 795–96 (quoting Short-Term, Limited-Duration Insurance, 83 Fed. Reg. 38,212, 38,213 (Aug. 3, 2018)).

⁴⁷ *See id.* at 797.

⁴⁸ *Id.*

Both the majority and the dissent applied *Chevron* Step Two to the Departments' rule, focusing on whether the agencies had reasonably interpreted "short-term, limited duration insurance" as it appears in the Affordable Care Act. While hardly noteworthy on its own, the move suggests a commitment to the *Chevron* framework that may not withstand closer scrutiny. When agency interpretations subvert, rather than promote, broader democratic values — as the Departments did here — the justifications underlying the *Chevron* framework dwindle. Political accountability, for example, is compromised. So too is agency expertise. Even the legal fiction about congressional intent on which *Chevron* rests seems to collapse. The D.C. Circuit's reflexive application⁴⁹ of *Chevron* therefore highlights a tension between the doctrine and the values it purports to protect.

Underlying the *Chevron* framework is the presumption that administrative agencies are healthy institutions that respect "basic norms of good governance."⁵⁰ Unlike courts, agencies may "updat[e]" statutes to fit changing circumstances,⁵¹ but they cannot, say, rewrite or sabotage statutes themselves.⁵² When agencies abuse their authority — and fail to exercise their delegated authority in a "democratically reasonable fashion"⁵³ — the justifications for *Chevron* fade.⁵⁴ The facts of this case suggest the Departments were concerned less with "fill[ing] up the details"⁵⁵ of the Affordable Care Act than with hollowing out its reach.⁵⁶ By expanding the criteria through which insurance plans could qualify as STLDI, the Departments' rule fashioned the limited exception into a "long-term form of primary insurance coverage"⁵⁷ far beyond the scope

⁴⁹ See *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring) (accusing *Chevron* of producing "reflexive deference," *id.* at 2120).

⁵⁰ Coenen & Davis, *supra* note 2, at 830; see also Gillian E. Metzger, Essay, *Agencies, Polarization and the States*, 115 COLUM. L. REV. 1739, 1787 (2015) ("It falls to agencies to develop policy in the face of political dysfunction . . .").

⁵¹ Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2587 (2006).

⁵² See, e.g., William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509, 1545–46 (2019); Madeline June Kass, *Presidentially Appointed Environmental Agency Saboteurs*, 87 UMKC L. REV. 697, 723–25 (2019).

⁵³ Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 765 (2007).

⁵⁴ Coenen & Davis, *supra* note 2, at 830 ("If agencies are . . . substituting brute force and nonsensical assertions of power for the good-faith exercise of policymaking expertise, then the case for [*Chevron* deference] . . . becomes considerably more difficult to sustain.")

⁵⁵ *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

⁵⁶ See Dylan Scott, *How Trump Gave Insurance Companies Free Rein to Sell Bad Health Plans*, VOX (June 30, 2020, 5:00 AM), <https://www.vox.com/2020/6/30/21275498/trump-obamacare-repeal-short-term-health-care-insurance-scam> [<https://perma.cc/K9BE-3G2D>].

⁵⁷ *ACAP*, 966 F.3d at 796 (Rogers, J., dissenting).

of what Congress had originally intended.⁵⁸ Therefore, *ACAP* may be a case where the values behind *Chevron* deference would have been better served by declining to apply the *Chevron* framework and engaging in de novo statutory review.

One justification for the *Chevron* framework is political accountability: while neither federal judges nor agency heads are democratically elected, the latter make policy choices under the direction of the President, who is elected and held accountable for those decisions.⁵⁹ But the Departments' own rationale for their new STLDI rule undercuts this argument. Oversight by the President "endow[s] agencies with a degree of democratic legitimacy" that courts do not enjoy.⁶⁰ That presumption of legitimacy, however, is compromised when agencies act in bad faith, not just misconstruing Congress's legislative intent but deliberately subverting its legislative "plan."⁶¹ Congress had such a plan with the Affordable Care Act, writing into the statute itself its aims to "achieve[] near-universal coverage" by "increasing health insurance coverage," "minimiz[ing] . . . adverse selection," and "broaden[ing] the health insurance risk pool to include healthy individuals, which will lower health insurance premiums."⁶² As the Departments recognized in their 2016 rule, Congress understood STLDI as a placeholder "to fill temporary gaps" in coverage when transitioning from one job to another.⁶³ Presenting STLDI as an "affordable alternative" to ACA-compliant insurance, as the Departments did with their new rule, clashes with that understanding and with Congress's express goals.⁶⁴ That Congress enacted as comprehensive a statutory scheme as it did suggests it was not

⁵⁸ See *id.* at 798 ("It is difficult to imagine a starker conflict between a statutory scheme and a rule that purports to administer it."); Brief Amicus Curiae of U.S. House of Representatives in Support of Appellants at 13–22, *ACAP*, 966 F.3d 782 (D.C. Cir. 2020) (No. 19-5212) ("The 2018 Rule is a prime example of an action . . . that undermines the Affordable Care Act." *Id.* at 13.).

⁵⁹ See, e.g., Evan J. Criddle, *Chevron's Consensus*, 88 B.U.L. REV. 1271, 1288–90 (2008).

⁶⁰ Coenen & Davis, *supra* note 2, at 835; see also *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190 (2000) (Breyer, J., dissenting) ("Insofar as the decision to regulate tobacco reflects the policy of an administration, it is a decision for which that administration, and those politically elected officials who support it, must (and will) take responsibility.").

⁶¹ Abbe R. Gluck, *The Supreme Court, 2014 Term — Comment: Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 80, 88 (2015) (distinguishing Congress's "plan" from its legislative purpose).

⁶² See 42 U.S.C. § 18091(2) (including findings related to the need for an individual mandate).

⁶³ *ACAP*, 966 F.3d at 795 (Rogers, J., dissenting) (quoting Excepted Benefits; Lifetime and Annual Limits; and Short-Term, Limited-Duration Insurance, 81 Fed. Reg. 75,316, 75,317 (Oct. 31, 2016)).

⁶⁴ Short-Term, Limited-Duration Insurance, 83 Fed. Reg. 38,212, 38,229 (Aug. 3, 2018). Enrollment in STLDI plans will likely reach 1.9 million by 2022, with most of these individuals "assumed to be enrollees . . . previously covered" in the ACA marketplace. Paul Spitalnic, *Estimated Financial Effects of the Short-Term, Limited-Duration Policy Proposed Rule*, CTRS. FOR MEDICARE & MEDICAID SERVS. 2 (Apr. 6, 2018), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/Downloads/STLD20180406.pdf> [<https://perma.cc/7UA3-TRFV>].

interested in creating a broad exception to that scheme. But by deferring to the Departments' interpretation, the D.C. Circuit seemed to punish Congress for not being express enough. Where an agency interpretation exploits ambiguity to disable legislation enacted by 535 elected members of Congress, political accountability fails to justify the *Chevron* framework.

Another justification for *Chevron* rests on expertise: agency interpretations merit deference because agencies have more technical expertise.⁶⁵ *Chevron* presumes that agency statutory interpretation is grounded in expert judgment, not purely in politics.⁶⁶ But the context in which the new STLDI rule emerged suggests little reliance on expertise. When "partisanship and politicization seep into agency deliberations, we might question the extent to which a given interpretation reflects an informed and considered judgment."⁶⁷ Here, the Departments seemed to rely less on expertise and more on an observation from the President that STLDI presented "an appealing and affordable alternative to government-run exchanges."⁶⁸ Some policies were not even included in the Departments' proposed rule, leaving stakeholders without an opportunity for comment.⁶⁹ What prompted the Departments to act, it seems, was not their shared knowledge of health insurance policy, informed by outside opinion, but rather the White House's concern with the "onerous and expensive insurance mandates and regulations" of the Affordable Care Act.⁷⁰ Some scholars have noted an anxiety within the Supreme Court over unchecked executive power "at work in the form of political interference with agency expertise."⁷¹ It appears that something similar happened here. The value of expertise that underlies the *Chevron* framework was not served by applying *Chevron* in this case.

Some would argue *ACAP* presents precisely the kind of case that *Chevron* deference is meant to resolve.⁷² Perhaps the D.C. Circuit was right to consider the reasonableness of the Departments' interpretation at *Chevron* Step Two, or it might have asked at Step One whether the

⁶⁵ See Anita S. Krishnakumar, *The Anti-messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. 1465, 1476 (2011) (arguing that *Chevron* deference "shields courts from . . . becoming mired in the technical details of a statute's application").

⁶⁶ See Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 87.

⁶⁷ Coenen & Davis, *supra* note 2, at 835 (citing *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007)).

⁶⁸ Exec. Order No. 13,813, 82 Fed. Reg. 48,385, 48,385 (Oct. 17, 2017) (directing the Departments to consider proposing regulations "to expand the availability of STLDI" within sixty days, *id.* at 48,386).

⁶⁹ See generally Short-Term, Limited-Duration Insurance, 83 Fed. Reg. 7,437 (Feb. 21, 2018) (noting policy allowing renewal of STLDI plans for up to thirty-six months not included in proposed rule).

⁷⁰ Exec. Order No. 13,813, 82 Fed. Reg. at 48,385.

⁷¹ Freeman & Vermeule, *supra* note 66, at 95 (discussing *Massachusetts*, 549 U.S. 497).

⁷² *Chevron* itself, for example, deferred to an agency policy criticized as deregulatory. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 n.7, 865-66 (1984).

statute's purpose renders the phrase "short-term limited-duration" unambiguous. But the entire framework for deference seems inappropriate when the Departments have acted in bad faith. The Departments not only stretch the duration of short-term insurance plans beyond what Congress intended, but also provide instructions on how to extend those plans indefinitely without triggering federal enforcement. Nothing prohibits insurance providers, the Departments note, from "offering a new short-term, limited-duration insurance policy to consumers who have previously purchased this type of coverage, or otherwise prevent[ing] consumers from stringing together coverage under separate policies . . ." ⁷³ Under these circumstances, "it may be possible for a consumer to maintain coverage . . . for extended periods of time." ⁷⁴ The Departments even disclaim their authority to keep individuals or issuers from exploiting these loopholes. ⁷⁵ To preserve loopholes is one thing; to encourage their exploitation is another, cutting against notions of both political accountability and agency expertise. In applying the *Chevron* framework, the D.C. Circuit seemed to gloss over concerns about how these agencies had exercised their authority. ⁷⁶

The Departments' new rule is not the first effort to undermine the Affordable Care Act, nor will it be the last. ⁷⁷ In 2017, for example, Congress lowered the ACA's "shared responsibility payment" to zero dollars, ⁷⁸ effectively reducing the Act's individual mandate to an "ineffectual, advisory statement." ⁷⁹ Whereas that move involved Congress amending its own law, the STLDI rule reveals a not-so-veiled attempt by the executive branch to undermine a law from within. At issue in this case was not that the Affordable Care Act was weakened but how it was done. In responding to instances of political dysfunction, few courts have questioned whether the *Chevron* framework is appropriate. ⁸⁰ *Association for Community Affiliated Plans* demonstrates the pitfalls of this reflexive application of that framework.

⁷³ Short-Term, Limited-Duration Insurance, 83 Fed. Reg. 38,212, 38,222 (Aug. 3, 2018).

⁷⁴ *Id.*

⁷⁵ *Id.* ("The Departments are also significantly limited in their ability to take an enforcement action . . . with respect to such transactions involving products or instruments that are not health insurance coverage.")

⁷⁶ Compare *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (considering whether Congress had delegated interpretive authority to an agency), with Bressman, *supra* note 53, at 764–65 (arguing that the Court refused to apply *Chevron* where an agency did not exercise its authority in a "democratically reasonable fashion," *id.* at 765, and discussing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and *Gonzales v. Oregon*, 546 U.S. 243 (2006)).

⁷⁷ See Gluck, *supra* note 61, at 63–64 ("*King v. Burwell*"] was an effort to pull the [ACA] apart by concentrating on 'bits and pieces of the law.'" (internal quotation omitted)).

⁷⁸ See Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017).

⁷⁹ Opening Brief for the United States House of Representatives as Respondent Supporting Petitioners at 34, *California v. Texas*, No. 19-840 (argued Nov. 10, 2020) (U.S. May 6, 2020).

⁸⁰ See VALERIE C. BRANNON & JARED P. COLE, CONG. RSCH. SERV., LSB10204, DEFERENCE AND ITS DISCONTENTS: WILL THE SUPREME COURT OVERRULE *CHEVRON*?, at 2 (2018).